

**The Child's Hospital, Samaritan Service Corp., and Child's Nursing Home Company, Inc. a/k/a Child's Hospital, Inc. and New York State Nurses Association, Petitioner. Case 3-RC-9734**

March 4, 1993

**ORDER DENYING REVIEW**

BY MEMBERS DEVANEY, OVIATT, AND  
RAUDABAUGH

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel, which has considered the Employer's request for review of the Regional Director's Decision and Direction of Election (pertinent portions are attached). The request for review is denied as it raises no substantial issues warranting review.<sup>1</sup>

<sup>1</sup> The only issues raised in the request for review were whether the Regional Director erred in finding appropriate a unit consisting of all registered nurses employed by the Employer; whether the Regional Director erred in excluding the director of quality/risk management from the unit; and whether the Regional Director erred by not directing a new election despite the employee turnover and passage of time.

**APPENDIX**

**DECISION AND DIRECTION OF ELECTION**

The Employer's name appears as corrected at the hearing.

The parties have stipulated, for the purposes of this proceeding, that the employing entity (the Employer) consists of The Child's Hospital, a not-for-profit surgical care center, providing both inpatient and ambulatory services; Child's Nursing Home Company, Inc., a 120-bed residential nursing home attached to the surgical care center; and Samaritan Service Corp. (Samaritan), which provides shared services, including finance, payroll, purchasing, data processing, security, admissions, and medical records, to the hospital and the nursing home. The Employer, which is located at 25 Hackett Blvd., Albany, New York, is incorporated and licensed under the laws of the State of New York. During the past calendar year, the Employer received gross revenues in excess of \$500,000 and purchased and received goods and services in excess of \$50,000 from outside the State of New York.

The Petitioner seeks to represent a unit consisting of all registered nurses employed at the hospital and nursing home; there are presently no registered nurses employed by Samaritan. The Employer maintains that the only appropriate unit is one consisting of all professional employees. In this regard, the Employer, contrary to the Petitioner, asserts that it is not an "acute care hospital" within the coverage of the Board's Final Rule on Collective-Bargaining Units in the Health Care Industry, 29 CFR 103, 54 Fed.Reg. No. 76, 284 NLRB 1580 (1989) (the Rule). In addition, the Employer asserts that even if it meets the definition of "acute care hospital," nevertheless there are extraordinary circumstances present which would render the petitioned-for unit of registered nurses inappropriate. In this regard, the Rule provides that, except in extraordinary circumstances and in cir-

cumstances where there are existing nonconforming units, there shall be eight appropriate units for acute care hospitals, one of which is a registered nurse unit.

The parties have also stipulated that, in the event a registered nurse unit is found to be appropriate, the registered nurses employed by all three components of the Employer shall be included in the unit. In this regard, Stephen J. Lauko serves as the chief executive officer of both Samaritan and the hospital. The employees of all three entities share the same cafeteria, as well as certain other areas which are common to all, including corridors, board rooms, kitchen, and snackbar. The nursing home occupies 43,318 square feet, the hospital 39,532 square feet, and Samaritan utilizes 15,462 square feet of space within the hospital and the nursing home. I find that the record contains evidence that the employees of the three entities share a community of interests sufficient to approve the parties' stipulation.

At the hearing, the Employer asserted that it is not an acute care hospital but is, rather, primarily an ambulatory surgery outpatient institution. By means of an offer of proof, the Employer contends that, inasmuch as the outpatient services are auxiliary in nature and account for 95 percent of the hospital's activity, and given the relationship with the nursing home, extraordinary circumstances are present which render the petitioned-for unit of registered nurses inappropriate. In this regard, the Employer asserts that the 14 physician assistants would not be employed if the hospital were an acute care facility and that they are present only because of the ambulatory surgical nature of the institution and the resultant diminished presence of physicians.

The hearing officer rejected the above offer of proof. As set forth below, I find the hearing officer's ruling in this regard to be without prejudicial error.

In its posthearing brief, the Employer maintains that the performance of ambulatory surgery constitutes not only a predominant, but borders on exclusive activity, and asserts the Board did not intend such a facility to fall within the definition of an acute care hospital. The Employer also asserts that, had the hearing officer permitted it to do so, it would have demonstrated the existence of extraordinary circumstances, based on the interrelationship among the three entities, the different nature of nursing care provided by the hospital, the expanded role of physician's assistants, and the centralized labor relations function among the facilities.

The record reveals that the hospital, incorporated in 1927, has been in existence since the 1800s. The current Hospital Operating Certificate, issued by the New York State Department of Health on February 1, 1990, provides for 20 medical-surgical beds. The certificate provides authority to perform ambulatory surgery, social work services, cystoscopy, and nuclear medicine. The hospital bylaws, which were last amended on January 22, 1991, provide, "The general purpose of the corporation shall be to own, operate, maintain, and manage a hospital under the auspices of the Episcopal Diocese of Albany, with an emphasis on specialty and ambulatory surgery."

Testimony presented by the Employer indicates that approximately 95 percent of the medical services performed by the hospital is ambulatory and that the same percentage of hospital revenue is derived from the performance of ambulatory surgery in areas such as ophthalmology, ear, nose and throat, and plastic surgery. The record reveals that, during

the 1-year period ending May 1991, the monthly number of patient days (number of patients multiplied by days of stay) for inpatients of the hospital has averaged 40 per month, with 48 surgeries performed on inpatients. The average length of stay for hospital patients is 2.3 days.

On October 10, 1990, the hospital filed a proposal with the New York State Department of Health, Office of Health Systems Management, to expand its operating room capacity from six to eight operating rooms. On November 27, 1989, the hospital had sought authorization to replace the existing operating rooms. In support of the application, the hospital asserted:

[that it] intends to maintain its institutional status as a hospital to achieve its objective of becoming the Regional Post-Operative Recovery Center for the Capital District. . . . Given the patient mix and technology requirements, it is imperative that The Child's Hospital maintain 20 inpatient beds to support such clinical services as Ophthalmology, Urology, Ophthalmology [sic], Otolaryngology, and Plastic Surgery Services. Whereas technology advances allow for more cases to be conducted on a "same-day" surgery basis, it is medically necessary for certain cases to be clinically monitored on a limited stay basis (not to exceed 5 days).

The application included yearly actual and projected ambulatory surgery and short stay volumes. The application further notes that the hospital plans to become "an Ambulatory Surgery Center and Short Term Stay Care Unit." The expansion and remodeling of ambulatory surgical suites is currently under construction. In its November 27, 1989 application, the hospital estimated that it would have 139.50 full-time employees in 1992 and that 54.97 full-time employees (FTE's) would be encompassed under the heading "Med-Surg In-Patients" in 1992. The application further provides, "Medical Surgical inpatients include nursing FTE's for operating room, recovery room, and ambulatory surgery."

Outpatient revenues continue to constitute the overwhelming percentage of the hospital's revenues. In 1990, the hospital received \$469,380 in inpatient revenues and \$12,015,711 in outpatient revenues. In May 1991, the hospital received \$67,661 in inpatient revenues and \$1,051,151 in outpatient revenue (including extended, i.e., up to 23-hour stays). By contrast, the 1990 gross revenue of the nursing home was \$6,549,482.

There are currently 42 registered nurses employed at the hospital and 12 registered nurses at the nursing home. The registered nurses employed at the hospital are classified according to the four nursing departments: operating room, postanesthesia care, ambulatory surgery, and extended care.

At the hearing, the parties stipulated that, in the event a registered nurse unit is found to be appropriate, four individuals employed at the nursing home who are registered nurses, but employed in various capacities (resident care coordinator, quality assurance utilization review coordinator, staff development assistant, and in-service/environmental) shall be excluded from the unit. The record does not provide any basis for the parties' agreement to exclude these positions from the unit. In view of the lack of record evidence which would support the parties' agreement to exclude the four positions from the unit, as well as certain Board cases

which indicate that such positions might be appropriately included within a registered nurse unit, I have determined not to approve the parties' stipulation to exclude these positions. Cf. *Long Island College Hospital*, 256 NLRB 202, 203 fn. 7 (1981) (parties' stipulation to exclude certain RN classifications from the unit is supported by record evidence). Under these circumstances, I shall permit individuals employed in the four classifications listed above to vote in the election, subject to challenge.

The parties have stipulated that, if a registered nurse unit is found to be appropriate, Deborah Branigan is employed as a casual employee and is not working as a regular part-time employee, and thus shall be excluded from the unit. In addition, the parties stipulated that Odette Daskalakis shall be included as registered nurse due to the extent of unit work she performs. Based on the parties' stipulations, supported by record evidence which is in accord with the stipulations, I shall exclude from the unit Deborah Branigan as a casual employee and include Odette Daskalakis on the basis of the extent to which she performs unit work.

The Employer, in asserting that an overall professional unit is the only appropriate unit, would include the 14 hospital physician assistants, a hospital dietician, 2 Samaritan social workers, 1 Samaritan pharmacist, and 4 Samaritan medical technologists. The Employer asserts that these individuals' duties are defined by the ambulatory care nature of the hospital as well as the performance of duties relating to the nursing home. Thus, the Employer asserts that there is a "honeycombing" of services between the hospital and nursing home.

Section 103.30(f)(2) of the Rule defines an acute care hospital as follows:

(2) "Acute care hospital" is defined as either a short term care hospital in which the average length of patient stay is less than thirty days, or a short term care hospital in which over 50% of all patients are admitted to units where the average length of stay is less than thirty days. Average length of stay shall be determined by reference to the most recent twelve month period preceding receipt of a representation petition for which data is readily available. The term "acute care hospital" shall include those hospitals operating as acute care facilities even if those hospitals provide such services as, for example, long term care, outpatient care, psychiatric care, or rehabilitative care, but shall exclude facilities that are primarily nursing homes, primarily psychiatric hospitals, or primarily rehabilitation hospitals. Where, after issuance of a subpoena, an employer does not produce records sufficient for the Board to determine the facts, the Board may presume the employer is an acute care hospital.

The Board, at Section 103.30(f)(1) of the Rule, adopted the definition of "hospital" as set forth in the Medicare Act, 42 U.S.C. § 1395x(e), as revised 1988. Under this definition, hospitals are institutions which are primarily engaged in diagnostic, therapeutic, and rehabilitation services to injured, disabled, or sick inpatients; provide 24-hour nursing service rendered by or under the supervision of a registered nurse; have utilization review and discharge planning procedures; and are licensed as a hospital by a state or local government.

The Board made it clear that the Rule applies to all acute care hospitals, irrespective of size or number of beds. 284 NLRB 1566-1567. Furthermore, the Board, in devising the Rules, specifically considered and rejected the Employer's argument here that, inasmuch as it is primarily an outpatient, rather than an acute care facility, and is an "amalgam type of institution," which includes a nursing home and support service provider, it should be excluded from coverage of the Rule. The Board, in rejecting such a claim, noted that "[m]any of today's hospitals have a number of other types of units, such as outpatient clinics, nursing care units, etc., and the Board did not intend to exclude such hospitals from coverage of the rule unless any one of the excluded ancillary services predominated." In addition, the Board noted that it did not intend "to permit a hospital to argue successfully that since the number of its outpatient visitors exceeded the number of its over-night (acute care) patients, it was not an acute care hospital, and therefore not subject to the rules." 284 NLRB 1591. In order to prevent unintended litigation over such a claim, the Board deleted the initial reference to "the primary purpose of the hospital" from the final Rule.

With regard to the "extraordinary circumstances" exception to the Rule, the Board indicated that it is to be construed narrowly. In this regard, considerations such as the size of the institution, the variety of services (including the range of outpatient services), different staffing patterns, and the degree of work contacts between groups of employees, do not fall within the exception. The party seeking to demonstrate extraordinary circumstances has the "heavy burden" of showing that its arguments are substantially different from those considered by the Board during the rulemaking process. 284 NLRB 1573-1574.

The Board noted that registered nurses are unique in that their profession requires continuous patient interaction and that all acute care facilities have an organized department of nursing. 284 NLRB 1544. While it found variances in the levels of patient care acuity among hospitals, the Board found that the nature of registered nurses' duties were not changed merely because they work on teams. 284 NLRB 1569. Thus, assuming that the physician's assistants are professional employees, it does not appear that their presence has resulted in any change in the duties of the registered nurses sought.

Based on the foregoing, and the record as a whole, I find that the Employer is an acute care hospital within the coverage of the Final Rule; accordingly, the petitioned-for unit of registered nurses is appropriate for bargaining. In this regard, I note that the Board has rejected the number of inpatient beds as a basis for excluding an otherwise covered institution. In addition, the Board expressly stated that it did not intend to exclude from coverage acute care hospitals merely because the number of outpatient patients exceeds the number of overnight, i.e., acute care, clients.

In addition, in finding that the Employer clearly meets the literal definition of an acute care hospital, I note that the average length of stay of inpatients is less than 30 days, the hospital is organized into 4 nursing departments; the hospital has 20 inpatient beds, it performs more than 200 surgeries per year on inpatients, and it performs a wide range of surgical procedures in areas such as plastic surgery, gynecology, ophthalmology, urology, ear, nose and throat, and general surgery. I also note that the hospital's bylaws expressly de-

fine its purpose as a "hospital . . . with an emphasis on specialty and ambulatory surgery." Similarly, the hospital's stated intent of becoming a "short-term stay care unit" is consistent with the definition of an acute care hospital. Finally, I note that the Board's definition limits the exclusions to those institutions which are primarily nursing homes, psychiatric hospitals, or rehabilitation hospitals. In this regard, it is apparent that the Board deliberately declined to exclude from coverage acute care hospitals which are primarily devoted to outpatient care, since the Board specifically referred to outpatient care in the same sentence in which it thereafter enumerated the exclusions. While the Employer asserts in its posthearing brief that the performance of ambulatory services borders on exclusivity, I find that the nature and extent of inpatient, i.e., acute care given is clearly sufficient to require coverage as an acute care hospital.

I also conclude, contrary to the Employer's contention, that there are no extraordinary circumstances warranting a departure from the Rule's coverage. Thus, the Board clearly states that this exception is to be construed narrowly and that the Employer bears a "heavy burden" to show that its arguments are substantially different from those considered and rejected by the Board. I find that the Employer has not met that burden. Thus, among those considerations rejected by the Board are the size of the institution, the range of outpatient services provided, different staffing patterns, and the extent of interaction of registered nurses with other professional employees. I find that the asserted expanded role of physician's assistants does not constitute an extraordinary circumstance. The Employer also asserts that it is a unique institution in view of the interrelationship of operations of the hospital, nursing home, and Samaritan, including those relating to labor relations. It does not appear that this constitutes an extraordinary circumstance, since the Board expressly included within coverage those acute care hospitals which provide nonacute care services; and the nature of the services performed by Samaritan do not appear to have any material effect on the nature of duties performed by registered nurses. Finally, while the parties have stipulated that, if a registered nurse unit is found to be appropriate, such unit shall include those employed at the nursing home, registered nurses in the nursing home constitute less than one-fourth of the overall unit.

The Employer also maintains that the nature of nursing care provided by the hospital's registered nurses is different from that provided in acute care hospitals due to the predomination of outpatients. I do not find this to constitute an extraordinary circumstance. Thus, as noted earlier, the clearly inpatient care services are not insubstantial, and the level and nature of nursing care required for such inpatients does not appear to deviate from the norm. Moreover, with regard to the ambulatory surgery function of the hospital, while they may not literally meet the definition of "acute care," the outpatient operations are consistent with the hospital's acute care function in light of the nature and extent of surgical procedures performed, the necessity of substantial numbers of outpatients having extended stays, and the hospital's acknowledged need to have certain outpatient cases monitored on a "limited stay" basis. This goes well beyond the functions of a typical hospital outpatient clinic.

In view of the foregoing, I shall direct an election in the unit sought by the Petitioner. There are approximately 54 employees in the unit found appropriate.